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Robert K. Corbin

July 3, 1979

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ARIZONA ATTORNEY GENERAL

Mr. John C. Richardson
DeConcini McDonald Brammer
Yetwin & Lacy, P.C.
240 North Stone Avenue
Tucson, Arizona 85701

Re: I79-185 (R79-167)

Dear Mr. Richardson:

Pursuant to A.R.S. § 15-122(B), we decline to review your May 29, 1979 opinion addressed to the Superintendent of the Marana Public Schools relating to the power of a school board to enter into an agreement which would bind a successor school board. We believe A.R.S. § 15-436(B), shielding the board from personal liability when relying upon the Attorney General's written opinion, applies equally to board action taken in reliance on a County Attorney's opinion which we have declined to review pursuant to A.R.S. § 15-122(B).

Sincerely,

Bob Corbin
BOB CORBIN
Attorney General

BC/mm

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PLEASE REPLY TO: TUCSON

May 29, 1979

Dr. Nels H. Havens
Superintendent
Marana Public Schools
11279 West Grier Road
Marana, Arizona 85238

Dear Dr. Havens:

The Boards of Trustees and Education of Marana School Districts Nos. 6 and 106 has requested our advice respecting the following question:

> In what circumstance does a school board have the power to enter into contracts or other agreements extending past its members' terms of office thus binding a successor school board?

The answer to this inquiry is presented in the discussion below.

1. INTRODUCTION

Research into when a school board has the power to enter into a contract or other agreement which will bind successor school boards indicates that there is no definitive and simple resolution to this question. Although the materials and cases viewed present various "general rules", these statements are not very helpful when attempts are made to apply them to a particular fact situation. The tests can, however, provide broad guidelines which should be considered before any contract or agreement is entered into which would extend past the terms of the members of the board then in office.

2. THE DURATION OF THE CONTRACT DESIRED BY THE SCHOOL BOARD MAY NOT CONFLICT WITH STATUTORY REQUIREMENTS.

Many of the Attorney General's Opinions discussing the allowable term of a contract by a school district are resolved on the basis that the term of the contract desired is prohibited by the plain terms of Arizona statutes. See e.g. Attorney

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General Opinion R75-333 (School District may not hire school district manager for term of two years because A.R.S. §15-444(B) permits extended employment contracts of four years only for superintendents or principals); Concurring Attorney General Opinion 63-42-C (Board of Trustees cannot enter into a contract for period greater than one year with school bus drivers because A.R.S. §15-438 authorizes a board to employ and fix salaries of employees "for the succeeding year"). Therefore, whenever a statute authorizes a school board to act, but limits the duration of the exercise of such a power, the school board is necessarily bound by such limitation.

A somewhat more involved Attorney General's Opinion, numbered I79-25-C, was issued on January 23, 1979. The Maricopa County Attorney's Office issued an opinion which in part stated that a school district could not enter into a contract for goods or services in a budget year when the contract will not "be completed" in the same budget year. That opinion was concurred in by the Attorney General. The Maricopa County Attorney's Opinion stated, in pertinent part:

> "Budgets are a practical method of matching revenue and expenditures. Necessary expenditures are delineated in the budget and tax rates are set to produce the requisite revenues. By law, A.R.S. §15-1202(J), [now A.R.S. §15-1202(k)] a school district can not make an expenditure nor incur a debt, obligation or liability for any purpose itemized in the budget in excess of the amount specified for such items. As I read A.R.S. §15-1202(J), this means that the expenditure of any funds which are part of the budget can only be done for a purpose specified in the budget and only for the amount enumerated. This, in my opinion, prohibits multi-year contracts which obligate the district for an amount greater than that specified in the budget and it prohibits contracts for a purpose not included in the budget.
>
> In addition A.R.S. §15-1204(B) allows warrants to be drawn only for one month after the close of the fiscal year for payment of obligations incurred during the fiscal year for which such budget was approved or in fulfillment of contracts

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> properly made during or applicable to such year for goods received or service rendered prior to the close of such fiscal year. After a period of two months no further payments can be made on any claim for expenditures of such fiscal year and the money lapses. Because of the above law, it is my opinion that a school district can not enter into a contract for goods which will be delivered or services rendered in the next fiscal year. Therefore the answer to question one [i.e., whether a school district may enter into a contract for goods and services when the contract will not be completed in the same budget year] is no.

The Opinion then went on to discuss A.R.S. §15-1204 which provides the method for payment of obligations after the close of the fiscal year and for rebudgeting to allow payments for contracts extending beyond one budget year. Attorney General Opinion I79-25-C does not mean that services must be completed or goods delivered in one year, but only that they must be fully compensated for in the initial budget year or the uncompensated amounts must properly be rebudgeted.

3. A SCHOOL BOARD IS PROBABLY NOT A "CONTINUING BODY."

Before the general question of when a school board may contract to bind its successors can be assessed, a threshold determination must be made. If a school board is characterized as a "continuing body", there is no such thing as a successor board and school boards are free to make long-term contracts.

This precise issue was addressed in a 1961 Arizona Attorney General's Concurring Opinion, numbered 61-3-C. In that opinion, the Attorney General's Office concurred in an opinion written by the Pinal County Attorney which found that a school board is a continuing body despite a change in membership and therefore a new board is the same as an old board that might have entered into a long-term contract. Accordingly, the opinion concluded, "a school board is a continuing body and as such, will bind its successors by its acts." Id; see also Town of Tempe v. Corbel, 17 Ariz. 1, 147 P. 745 (1915) (general rule is that a public board may contract in good faith beyond the term of office of its members because "a board is a continuous existing corporation;

while the personnel changes, the corporation continues unchanged").

This reasoning, however, was implicitly overruled in School District No. 69 of Maricopa County v. Altherr, 10 Ariz.App. 333, 458 P.2d 537 (1969). The Altherr court found that an attempt by a school board to bind a successor school board may be invalid and stated:

> "Where, as under our statutory scheme, a school board consists of several members whose terms expire at different times with annual elections being held to fill offices whose terms have expired, the school board is considered a non-continuous body, organized each year. 78 C.J.S. Schools and School Districts §106. In other words, the Defendant school district had a 'new' school board each year." 10 Ariz.App. at 338-39, 458 P.2d at 542-43.

Thus, any argument that a school board can bind future boards because the board is actually a continuing body probably would not presently be persuasive.

4. THE POWER TO BIND SUCCESSOR BOARDS

a. The governmental v. proprietary function test.

One general rule as to whether a contract extending beyond the terms of school board members will be binding upon their successors distinguishes between the type of functions being exercised by the board. If the body is performing a "governmental or legislative" task then it has no power to bind future boards. However, in the exercise of "proprietary business" functions, the board is not so limited and can contract to bind successive boards for a reasonable length of time. City of Riviera Beach v. Witt, 286 So.2d 574, 574-75 (Fla. App. 1973); Cf. Olmsted & Gillelen v. Hesla, 24 Ariz. 546, 211 P. 589 (1922).

As might be expected, the difficulty stems from the definitions of "governmental" and "proprietary". Traditionally, a "proprietary" function is one which is not necessarily associated with government operations, and is often carried on by private enterprise. For example, although the Salt River Project in central Arizona is a political subdivision of the state, its operations in irrigation and water management

have been deemed "proprietary." Local 266, Etc. v. Salt River Project Agr. Imp. & P.Dist., 78 Ariz. 30, 275 P.2d 393 (1955) (Salt River Project has power to enter into collective bargaining agreement despite status as public entity because of the proprietary nature of its operations). See also Gardner v. Industrial Commission, 72 Ariz. 274, 233 P.2d 833 (1951), (when government entity is authorized to exercise a proprietary function, entity should have power to perform it in the same efficient manner as a private person or enterprise); City of Tucson v. Sims, 39 Ariz. 168, 4 P.2d 673 (1931), (when operating water system or lighting plant, a municipal corporation is acting in proprietary capacity).

In contrast, "governmental" functions are those traditionally associated with the government, and which are seldom undertaken by private enterprise. For example, imposing taxes, distributing welfare benefits, and regulating private business are functions deemed governmental.

Other state courts have made a somewhat different distinction between "governmental" and "proprietary" functions. In City of Riviera Beach v. Witt, supra, the court made the distinction as follows:

> "'We understand the test of a proprietary power to be determined by whether or not the agents of the city act in contract for the benefit and welfare of the people; any contract, in other words, that redounds to the public or individual advantage and welfare of the city or its people is proprietary, while a governmental function, as the term implies, has to do with administration of some phase of government, that is to say, dispensing or exercising some element of sovereignty....'" Id., 286 So.2d at 575 citing Daly v. Stokell, 63 So.2d 644, 645 (1953). (emphasis in original).

The Witt court, however, perhaps persuaded by the ambiguity of its own definitions, followed its attempt to distinguish governmental and proprietary functions with the following statement:

> "There is no precise dividing line between the two functions; they may sometime be difficult of distinction and may tend to overlap." Id.

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b. The discretion test.

An alternative analysis to the question of when a school board may enter into contractual agreements binding future boards is based on an assessment of the extent to which the discretion of future board members may be infringed upon. The Arizona cases and attorney general opinions discussing when future boards can be bound by an act of the present board seem to rely primarily on this analysis rather than the proprietary/governmental distinctions presented above. A Coconino County Attorney Opinion, which was concurred in by the Arizona Attorney General's Office in Concurring Opinion 69-8-C, considered the precise question of when one board's acts may bind a future board. The opinion provides:

> "The general law on the subject is that a Board cannot enter into a school contract so as to bind the discretion of their successors. However, other contracts which were valid when made are binding on the successors of the Board except where the contract is not for a necessary matter, or is for an unreasonable length of time, or where fraud is involved. 78 C.J.S. p. 1255, Schools and School Districts §278. Typical cases are the leasing of school buildings."

The general rule provided in Attorney General Opinion 69-8-C and quoted above is difficult to apply. There is no indication of what a "necessary matter" is, or what is an "unreasonable length of time." It is even difficult to tell what acts of a school board involve their discretion, as seemingly any act that is not directly mandated by statute can be termed discretionary.

In Pima County v. Grossetta, 54 Ariz. 530, 97 P.2d 538 (1939), the discretion analysis was applied to contractual agreements made by a board of supervisors with firms of attorneys to secure legal services in "certain, specified matters for fixed compensation." The court stated that generally "successors must be allowed to choose for themselves those persons on whose honesty, skill and ability they must rely." 54 Ariz. at 538, 97 P.2d at 541. Nonetheless, the Grossetta court concluded that the contracts in issue were "unitary contracts," not for the employment of the various attorneys as general advisors, and therefore fell "within the class of contract which may extend beyond the term of the contracting officers." Id; see also Town of Tempe v. Corbell, 17 Ariz. 1, 147 P. 745 (1915).

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In School District No. 69 of Maricopa County v. Altherr, supra, the court declared that the defendant school board had exceeded its authority in making statements to a contractor that its members intended or desired to purchase a school building should the contractor construct it. The court in part reasoned that such actions would restrict the freedom of action of successor boards. 10 Ariz.App. at 338, 458 P.2d at 542.

c. The validity of specific types of contractual agreements.

As has been demonstrated above, there is a considerable amount of uncertainty and lack of predictability as to the legality of any particular act by a school board which binds a successor board. Accordingly, numerous cases and attorney general opinions dealing with this area of the law have been summarized and the specific outcome of each noted.

ARIZONA DECISIONS:

1. School District No. 69 of Maricopa County v. Altherr, 10 Ariz.App. 333, 458 P.2d 537 (1969) - School board's statements to a contractor that its members intended or desired to purchase a school building should the contractor construct it did not form a binding agreement.

2. Pima County v. Grossetta, 54 Ariz. 530, 97 P.2d 538 (1939) - Board of supervisors held to possess power to enter into unitary contracts with law firms to handle specified matters for a fixed compensation, even though the performance of those contracts would extend beyond the term of the contracting officers.

3. Town of Tempe v. Corbell, 17 Ariz. 1, 147 P. 745 (1915) - It was beyond the power of the City Council of Tempe to enter into a one year contract to have the city streets watered, when a new council was to be seated within a few days.

4. Olmsted & Gillelen v. Hesla, 24 Ariz. 546, 211 P. 589 (1922) - County Highway Commission did not have the power to enter into a contract with an engineer to design, consult and supervise construction and improvement of highways in the county where such construction and improvements were to take at least three years.

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5. Arizona Attorney General's Concurring Opinion No. 69-8-C: the board of trustees of a school district cannot enter into a busing contract which would in effect bind successors because under A.R.S. §15-442 transportation for children is a discretionary matter.

DECISIONS IN OTHER JURISDICTIONS:

1. Board of Education of Vocational School of the County of Union v. Finne, 88 N.J. Super. 91, 210 A.2d 794 (1965) - School board had the power to hire an architect to provide complete architectural services for the construction of a proposed school, even though said construction was to run past the terms of the present board members.

2. Withers v. City of New York, 92 App. Div. 147, 86 N.Y.S. 1105 (App.Div. 1904) - A municipal board had the power to hire an architect for services relating to a specific structure, where the architect's term of service exceeded that of the board and was to terminate at the completion of the construction project.

3. City of Riviera Beach v. Witt, 286 So.2d 574 (Fla.App. 1973) - A city counsil's employment contract with a city prosecutor which purported to extend beyond the terms of the contracting officers was not binding on the successor officers.

4. Lafourche Parish Water Dist. v. Carl Heck Engineers, Inc., 346 So.2d 769 (La.App. 1977) - A local water district board had the power to enter into a five year contract with an engineering firm pursuant to which the firm was to provide necessary professional engineering services in connection with the planning and construction of all public improvements required and authorized by the board.

5. Slippery Rock Area Joint School System v. Franklin Township School Dist., 389 Pa. 435, 133 A.2d 848 (1957) - A local school board's contractual agreement to enter a joint school district for ten years and to incur a debt for the construction of school buildings which would be payable over more than a ten year period was within the power of the board.

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6. Detweiler v. School Dist. of the Borough of Hatfield, 376 Pa. 555, 104 A.2d 110 (1954) - A school board's contractual agreement to enter into a joint secondary school district and to perform a proposed lease agreement was valid and enforceable.

7. Witworth College v. City of Brookhaven, 161 F.Supp. 775 (S.D.Miss.), aff'd., 261 F.2d 868 (5th Cir. 1958) - Board of trustees' agreement constituting a lease and an option to renew the lease was not enforceable because such a decision should be left to the discretion of succeeding public bodies.

8. Board of Education of Brookhaven - Comsewogue Union Free School District v. Port Jefferson Station Teachers Association, 387 N.Y.S.2d 515 (1976) - A school board had the power to enter into a collective bargaining agreement with a teacher's association for a two year period, even though it was admitted that an effort to bind a municipality in its governmental capacity beyond the tenure of the board which made the contract is generally void.

9. City of Shelbyville v. Bedford County, 415 S.W.2d 139 (Tenn. 1967) - (1) A consent decree is a contractual obligation, the validity of which can be assessed under the governmental v. proprietary approach. (2) A city council has the power to enter into a consent decree obligating the city to pay present and future tax equivalent installments to the county, even though the obligations reach beyond the term of office of the contracting counsil.

5. SUMMARY

A review of the above cases indicates that the court decisions are not uniform in their application of the general rules discussed in this Memorandum. A few principles can be developed from these cases, however, which can be used when faced with a particular fact situation:

i. The court will look at the reasonableness of the contract and whether it is one of the more efficient methods of dealing with the matter. If it is, the court will attempt to use the general principles of law discussed in this Memorandum to uphold the contract.

ii. The court is particularly prone to disallow contracts which impose upon future boards the obligation to

use the services of persons that the board had no chance to select. An exception sometimes occurs when the services contracted for relate to only one event or act, even if this act or event extends into the term of a new board.

iii. Wherever a statute specifically provides the extent or duration of an allowable contract, the statute will control and the board is without power to enter into a contract for a longer period of time.

Perhaps what is most evident from a review of the cases and discussion presented in this Memorandum is that each particular situation must be considered on a case by case basis. It is suggested that legal advice be obtained when a particular fact situation is presented which the Board recognizes may possibly involve the issue of the legality of binding successor school boards. This Memorandum is useful to the Board primarily to recognize those contracts where the issue of binding future boards is likely to arise. Unfortunately, the state of the law is not such that a broad general statement can be given which would provide a ready answer when applied to any particular set of facts.

Pursuant to A.R.S. §15-122B, a copy of this opinion is being sent to the Attorney General for concurrence or revision.

Sincerely,

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

John C. Richardson

John C. Richardson

JCR:rms